87-856

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Petitioner,

v.

LAURENCE E. RANDALL AND NADINE D. RANDALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 23, 1987

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QUESTION PRESENTED

Did the District Court for the District of Columbia have the power to vacate a voluntary notice of dismissal under Rule 41(a)(1)(i), Fed. R. Civ. P., despite the fact that every circuit court that has considered the issue, except the court below, has held that there is no such power?

LIST OF PARTIES and RULE 28.1 LIST

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

The parent company of petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. is Merrill Lynch & Co., Inc. Companies which are not wholly-owned subsidiaries of Merrill Lynch & Co., Inc. or its wholly-owned subsidiaries, and which could be considered affiliates of the petitioner herein are: Americare Health Corp.; Axia Incorporated; Biotech Capital Corp.; Champion Energy Corp.; China Securities Investment Trust Corporation; Computer Power Corp.; C.C. Packaging; C.P.W. Limited; CTP Holdings Inc.; Data Broadcasting Corp.; Enhance Financial Services, Inc.; FGIC Corporation; Fruehauf Holdings Inc.; Great Lakes Power Investments; Interim Holding Corporation; International Metals Company; Iran Financial Services Company S.S.K.; Ithaca Industries Inc.; MVE Holding Corp. (Minnesota Valley Engineering); Merrill Lynch-Ayala International Pte. Ltd.; Merrill Lynch/Great Western Mortgage Securities, Inc.; Merrill Lynch-Nomura Management Company, Inc.; Merrill Lynch Realty/Burnet Inc.; Merrill Lynch Realty/Florida Inc.; Merrill Lynch Realty/North Bay Inc.; Merrill Lynch/North Los Angeles, Inc.; Merrill Lynch Realty/Richard Jowdy, Inc.; Merrill Lynch Realty/Santa Barbara Inc.; Merrill Lynch Realty/Tom Fannin, Inc.; Merrill Lynch S.A. Distribuidora De Titulos E Valores Mobiliarios; Merrill Lynch Servicos S/C Ltda.; New M & L Holding Inc.; Orbit Manufacturing, Inc.; Rerokkor, Inc.; RMR Holding Corporation; Stoody Holdings Inc.; Tandem Financial Group, Inc.; Trade Credit Underwriters Agency; USBA, Inc.; Williams Industrial Tool Inc.; Yale Industrial Products Inc.

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LAURENCE E. RANDALL AND NADINE D. RANDALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the case of *Randall* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* on June 19, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 820 F.2d 1317, and is reprinted in the appendix hereto, page 1a, *infra.*

The opinion of the United States District Court for the District of Columbia (Gasch, D.J.) is reported at 110 F.R.D. 342, and is reprinted in the appendix hereto, page 13a, *infra.*

The second opinion of the United States District Court for the Eastern District of California (Garcia, D.J.) is reported at 110 F.R.D. 499, and is reprinted in the appendix hereto, page 20a, *infra*.

The first memorandum opinion of the United States District Court for the Eastern District of California (Garcia, D.J.) has not been reported, and is reprinted in the appendix hereto, page 23a, *infra*.

The memorandum opinion of the United States District Court for the Northern District of California (Henderson, D.J.) has not been reported, and is reprinted in the appendix hereto, page 25a, *infra*.

JURISDICTION

On June 19, 1987, the District of Columbia Circuit entered a judgment and opinion affirming the judgment of the District Court. A petition for rehearing and suggestion for rehearing en banc was timely filed. On September 3, 1987, the court denied the petition for rehearing and rejected the suggestion for rehearing en banc.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 41(a)(1) of the Federal Rules of Civil Procedure

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the

United States or of any state an action based on or including the same claim.

Rule 60(b) of the Federal Rules of Civil Procedure

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have any prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

On December 6, 1983, Laurence E. Randall and Nadine D. Randall (the "Randalls") filed a complaint against Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") in the United States District Court for the Northern District of California. The Randalls alleged federal jurisdiction under 15 U.S.C. § 78aa and 28 U.S.C. § 1331(a) [sic]. Merrill Lynch moved simultaneously for orders transferring the action to the United States District Court for the District of Columbia under 28 U.S.C. § 1404(a), and dismissing the action under Rule 12(b)(6), Fed. R. Civ. P. On April 23, 1984, the court rejected the Randalls' claim of financial hardship and denied their request that if the case were to be transferred, it should go to the Eastern District of California. Instead, the court ordered the case transferred to the District of Columbia.

On July 31, 1984, while Merrill Lynch's motion to dismiss under Rule 12(b)(6) was still pending in the District of Columbia, the Randalls filed a second complaint, substantially identical to the first complaint, in the alternate forum already rejected by Judge Henderson of the Northern District: the United States District Court for the Eastern District of California. Approximately two weeks later, on August 13, 1984, the Randalls filed a notice of voluntary dismissal in the District of Columbia action, pursuant to Rule 41(a)(1)(i), Fed. R. Civ. P.

On March 12, 1985, Judge Garcia of the Eastern District rejected the Randalls' renewed claims of financial hardship, this time coupled with claims of poor health, and ordered that the second complaint be transferred to the District of Columbia. On May 3, 1985, while a motion to dismiss on the merits was pending, the Randalls again filed a notice of voluntary dismissal pursuant to Rule 41(a)(1)(i). The Randalls dismissed their action even though they had been advised by their counsel that the second voluntary dismissal might have claim preclusive effect under Rule 41(a)(1).

On July 9, 1985, the Randalls filed a petition for arbitration with the National Association of Securities Dealers. The

petition for arbitration involved the same claims put forth in the two prior lawsuits. In August, Merrill Lynch filed suit in the Eastern District of California, where the Randalls then resided, to enjoin the arbitration. On January 3, 1986, the court granted the injunction, holding that because of the two voluntary dismissals, the Randalls were precluded under Rule 41(a)(1) from litigating their claim a third time. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Randall*, 110 F.R.D. 499 (E.D. Cal. 1986). No appeal was taken from this decision.

On March 5, 1986, the Randalls filed a motion in the United States District Court for the District of Columbia, seeking to set aside their second voluntary dismissal. On May 15, 1986, the court granted the motion pursuant to Rule 60(b)(6), Fed. R. Civ. P. *Randall* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 110 F.R.D. 342 (D.D.C. 1986). The court acknowledged that the Supreme Court had held that Rule 60(b)(6) could not be used to relieve a litigant of improvident strategic decisions, or free, calculated, deliberate choices. Nonetheless, looking back on the same evidence which Judge Garcia of the Eastern District had found insufficient to prevent a transfer a year earlier, the court held that the Randalls' decision to dismiss was not free, calculated, or strategic because of Mr. Randall's health at the time of the second dismissal, and the Randalls' attendant financial condition. 110 F.R.D. at 344; pages 16a–17a, *infra*.

The District Court's decision was affirmed by a divided panel of the United States Court of Appeals for the District of Columbia Circuit on June 19, 1987. *Randall* v. *Merrill Lynch*, 820 F.2d 1317 (D.C. Cir. 1987). On September 3, 1987, the court denied a petition for rehearing and rejected a suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The District of Columbia Circuit's decision that a second notice of dismissal under Rule 41(a)(1)(i) can be vacated pursuant to Rule 60(b) conflicts with decisions of other circuits.

The District of Columbia Circuit explicitly held in this case that a second notice of dismissal under Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure can be vacated under Rule 60(b)(6). *Randall*, 820 F.2d at 1320; page 5a, *infra*. This decision conflicts with decisions of the Second, Fifth, Sixth, and Seventh Circuits holding that a district court cannot properly vacate a notice of dismissal, a line of cases that begins with a 1948 decision of Judge Learned Hand. *Kilpatrick v. Texas & Pacific Railway*, 166 F.2d 788, 792 (2d Cir.) (L. Hand, J.), *cert. denied*, 335 U.S. 814 (1948); *Johnson Chemical Co.* v. *Home Care Products*, 823 F.2d 28, 30-31 (2d Cir. 1987); *Thorp* v. *Scarne*, 599 F.2d 1169, 1173-76 (2d Cir. 1979); *Littman* v. *Bache & Co.*, 252 F.2d 479, 480-81 (2d Cir. 1958); *Pilot Freight Carriers* v. *International Brotherhood of Teamsters*, 506 F.2d 914, 916-17 (5th Cir.), *cert. denied*, 422 U.S. 1048 (1975); *D.C. Electronics* v. *Nartron Corp.*, 511 F.2d 294, 296-98 (6th Cir. 1975); *Winterland Concessions Co.* v. *Smith*, 706 F.2d 793, 795-96 (7th Cir. 1983); *Merit Insurance Co.* v. *Leatherby Insurance Co.*, 581 F.2d 137, 140-44 (7th Cir. 1978).

Furthermore, the First, Second, Fifth, Seventh, Eighth, and Ninth Circuits have held that the trial court has no discretion to interfere with a Rule 41(a)(1)(i) dismissal. *E.g.*, *Universidad Central Del Caribe, Inc.* v. *Liaison Committee on Medical Education*, 760 F.2d 14 (1st Cir. 1985); *Santiago* v. *Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985); *Carter* v. *United States*, 547 F.2d 258 (5th Cir. 1977); *Williams* v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976); *Plains Growers, Inc.* v. *Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250 (5th Cir. 1973); *Scam Instrument Corp.* v. *Control Data Corp.*, 458 F.2d 885 (7th Cir. 1972); *Foss* v. *Federal Intermediate Credit Bank of St. Paul*, 808 F.2d 657 (8th Cir. 1986); *Hamilton* v. *Shearson-Lehman American Express*, 813 F.2d 1532 (9th Cir. 1987); *Miller* v. *Reddin*, 422 F.2d 1264 (9th Cir. 1970).

II. The decision that a Rule 41(a)(1)(i) dismissal can be vacated is contrary to the policies of Rule 41 and makes possible the abuses Rule 41 was intended to prevent.

The conflict created by the District of Columbia Circuit is an important one because the decision in this case undermines the policies at the core of Rule 41(a)(1)(i), and amounts to a judicial amendment of the rule.

The purposes of Rule 41(a)(1)(i) are "to limit the right of dismissal to an early stage of the proceedings thereby curbing the abuse of the right which had previously been possible," *Littman*, 252 F.2d at 480, and to prevent "abuse and harassment" through the use of multiple successive dismissals by providing that the second voluntary dismissal has claim preclusive effect. *American Cynamid Co.* v. *McGhee*, 317 F.2d 295, 297 (5th Cir. 1963); *D.C. Electronics*, 511 F.2d at 298. *See generally* 9 C. Wright & A. Miller, *Federal Practice & Procedure* Civil §§ 2363, 2368 (1971); 5 *Moore's Federal Practice* ¶¶ 41.02, 41.04 (1987).

As the other circuit courts have recognized, Rule 41 effects these purposes by operating in an automatic fashion: the plaintiff files a notice of dismissal within the prescribed time and the case then terminates. The court has no role to play. *E.g., Johnson Chemical*, 823 F.2d at 30 (Rule 41(a)(1)(i) dismissal "is within the unfettered power of the plaintiff"); *Thorp*, 599 F.2d at 1176 (Rule 41(a)(1)(i) dismissals are to be "self-executing"); *D.C. Electronics*, 511 F.2d at 296 (Rule 41(a)(1)(i) does not call "for judicial involvement"); *American Cynamid*, 317 F.2d at 297 (Rule 41(a)(1)(i) dismissal "is a matter of right running to the plaintiff" and "the court has no role to play").

Under Rule 41(a)(1)(i), the court has no discretion to vacate the dismissal even if the court believes that it would be better if the action were not dismissed. *E.g., Johnson Chemical*, 823 F.2d at 30 (Rule 41(a)(1)(i) "is a bright line rule leaving no discretion to the courts"); *Pilot Freight*, 506 F.2d at 916 (Rule 41(a)(1)(i) embodies "objective standards" rather than a "subjective approach"); *D.C. Electronics*, 511 F.2d at 297 (Rule 41(a)(1)(i) does not call for "the exercise of judicial discretion"). Accordingly, the other circuits have

reversed district courts that vacated Rule 41(a)(1)(i) dismissals, *e.g., Johnson; Thorp; D.C. Electronics; Littman; Winterland;* and affirmed district courts that refused to vacate Rule 41(a)(1)(i) dismissals, *e.g., Merit Insurance; Pilot Freight Carriers.*

The decision of the District of Columbia Circuit in this case obliterates the "bright line" of Rule 41(a)(1)(i), undermining the policies of the Rule and making possible the evils that the Rule was supposed to prevent. Instead of operating in an automatic, predictable fashion, Rule 41(a)(1)(i) dismissals in the District of Columbia Circuit will now be subject to the broad discretion of the trial court to reopen, re-examine, and reconsider the dismissal for "any . . . reason justifying relief." Rule 60(b)(6).

In addition, the District of Columbia Circuit has in effect eliminated the two-dismissal limitation of the Rule, allowing the Rule to be used as a device for forum shopping and prolonging litigation. The instant case is a good example. As the concurring and dissenting opinion below correctly observed:

> The Randalls first attempted to prosecute their claim in the Northern District of California. After that court ordered the case transferred to Washington, D.C. and while a motion to dismiss was pending there, the Randalls voluntarily dismissed the action under Rule 41(a)(1). Meanwhile they started again in California, this time in the Eastern District. That court likewise ordered the case transferred to Washington, D.C.; the Randalls again voluntarily dismissed the action. Less than two months later they started yet a third litigation, presenting the claim to the National Association of Securities Dealers, Inc., for arbitration in San Francisco.
>
> This pattern of sustained maneuvering to have their claim heard in California belies the notion that intense financial and medical pressures *compelled* the Randalls to enter the dismissals. They were quite capable of pursuing the claim, but wished to exhaust every possible

> gambit to assure that the litigation would occur in California.

820 F.2d at 1322; pages 8a-9a, *infra* (emphasis in original). Rule 41(a)(1)(i) is supposed to prevent, not encourage, this type of conduct.

The other circuits have realized these dangers, and refused to allow Rule 41(a)(1)(i) dismissals to be vacated in the face of arguments that it was unfair or inequitable not to reach the merits. *E.g., Thorp*, 599 F.2d at 1176; *D.C. Electronics*, 511 F.2d at 298; *Pilot Freight Carriers*, 506 F.2d at 916. They have stated that changes in the Rule must come through the rule-making process, and not from the courts. *E.g., D.C. Electronics*, 511 F.2d at 298 ("the power of change rests with the rule making body, not the courts"); *Pilot Freight Carriers*, 506 F.2d at 917 ("the request must be addressed to the Supreme Court and to Congress, not to this Court"). It is not open to the District of Columbia Circuit to amend Rule 41(a)(1) by judicial fiat.

The only difference between the cases from the Second, Fifth, Sixth, and Seventh Circuits, and the instant decision of the District of Columbia Circuit is that in this case, the party claiming that it was unfair not to vacate the dismissal was the plaintiff, while in the other circuits, the motion to vacate was filed by the defendant. There is nothing, however, in the language of Rule 41(a)(1)(i), or the policies underlying it, which would support disparate treatment of plaintiffs and defendants. Indeed, there is no indication in any of the opinions, including the District of Columbia Circuit's, that the result depended on who filed the motion to vacate.[1]

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[1] Dicta in one Eighth Circuit case states that a trial court can, on the plaintiff's motion, vacate a Rule 41(a)(1)(i) notice of dismissal pursuant to Rule 60(b). *Englehardt* v. *Bell & Howell Co.*, 299 F.2d 480, 484 (8th Cir. 1962). There was no Rule 60(b) motion before the court in *Englehardt*. There are also three circuit court opinions that assume without discussion that a plaintiff can bring a Rule 60(b) motion to vacate a notice of dismissal. *Chang* v. *Smith*, 778 F.2d 83 (1st Cir. 1985) (dismissal not vacated); *Thomsen* v. *Terrace Navigation Corp.*, 490 F.2d 88 (2d Cir. 1974) (per curiam) (dismissal vacated); *Benton* v. *Vinson, Elkins, Weems & Searls*, 255 F.2d 299 (2d Cir.) (per curiam) (dismissal not vacated), *cert. denied*, 385 U.S. 885 (1958).

The District of Columbia Circuit purported to distinguish *Thorp* and *D.C. Electronics*, but on the grounds that those cases held "that a trial judge has no discretion to *prevent* a voluntary dismissal in the first instance; they did not speak to whether a court has discretion to vacate a voluntary dismissal . . ." *Randall*, 820 F.2d at 1320; page 5a *infra* (emphasis in original). This is simply wrong: both *Thorp* and *D.C. Electronics* involved the vacation of an already-filed notice of voluntary dismissal. *Thorp*, 599 F.2d at 1171 (notice of dismissal "vacated" eight days after it was filed); *D.C. Electronics*, 511 F.2d at 295 (notice of dismissal "vacated" after it was filed — precise dates not given). Thus, no valid distinction between the decision in this case and the decisions from the other circuits has been made.

CONCLUSION

The decision of the District of Columbia Circuit in this case conflicts with decisions of the First, Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits. This intercircuit conflict is important because the decision of the District of Columbia Circuit undermines the policies at the heart of Rule 41(a)(1)(i) and makes possible the evils that the Rule sought to prevent. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 23, 1987

APPENDIX

United States Court Of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 86-5372

LAURENCE E. RANDALL, et al.

v.

MERRILL LYNCH, et al., APPELLANTS

Appeal from the United States District Court for the District of Columbia (Civil Action No. 85-00942)

Argued March 2, 1987

Decided June 19, 1987

Barbara Moses, with whom Steven A. Brick, Jerry W. Markham and Stuart M. Goldberg were on the brief for appellants.

Paul H. Melbostad, with whom Thomas E. Horn and Douglas B. Huron were on the brief for appellees.

Before: MIKVA, STARR and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

Opinion concurring in part and dissenting in part filed by Circuit Judge WILLIAMS.

MIKVA, Circuit Judge: This appeal is the latest event in a protracted dispute arising from appellee's maintenance of securities accounts with Merrill Lynch. Appellees twice brought suit against Merrill Lynch in Federal District Court in California. On both occasions, Merrill Lynch successfully moved to transfer to the District of Columbia, and appellees responded in both cases by voluntarily dismissing pursuant

to Federal Rule of Civil Procedure 41(a)(1). The rule provides that a second voluntary dismissal has the effect of an adjudication on the merits. Following the second dismissal, appellees attempted to initiate arbitration. In January, 1986, the Eastern District of California enjoined the arbitration, as well as any other litigation, on the ground that a second voluntary dismissal under Rule 41(a)(1) operates as an adjudication on the merits barring further litigation. After this ruling appellees filed a motion with the District Court for the District of Columbia to vacate the second dismissal. In May, 1986, relying on Federal Rule of Civil Procedure 60(b)(6), the district court vacated the second dismissal, effectively authorizing appellees to go forward with their attempt at arbitration. It is this decision which Merrill Lynch challenges on appeal. We affirm.

I. BACKGROUND

In July, 1982, Laurence and Nadine Randall opened accounts with Merrill Lynch in the company's Washington, D.C. office. The Randalls thereafter moved to Chico, California, where they continue to reside. In December, 1983, the Randalls filed a complaint against Merrill Lynch in the United States District Court for the Northern District of California. As amended, the complaint alleged violations of various federal securities laws and regulations, as well as other claims. The essence of appellees' claim was that Merrill Lynch fraudulently concealed trading on the Randalls' account and fraudulently misrepresented the status of the Randalls' account, which caused them to violate prescribed margin requirements. Because of the margin-requirement violations, Merrill Lynch then froze the Randalls' account. As a result of this freeze, a number of options in the Randalls' options account expired, resulting in substantial financial loss. On April 23, 1984, the court granted Merrill Lynch's motion to transfer the case to Washington, D.C. pursuant to 28 U.S.C. § 1404(a). Appellees voluntarily dismissed their case on August 13, 1984, before any proceedings took place in the District Court for the District of Columbia.

Shortly thereafter, the Randalls filed a revised complaint in the U.S. District Court for the Eastern District of California, where Chico is located. The second complaint was substantially identical to the first complaint. As before, Merrill Lynch moved to transfer the case to the District of Columbia. In March, 1985, the court granted the motion to transfer.

In August, 1984, Laurence Randall suffered an attack of acute, stress-related anxiety disorder and was certified as fully disabled by the State of California. Mr. Randall's doctors directed him not to participate in any cross-country litigation because of serious risk of suffering a heart attack or stroke. Mr. Randall's inability to work coupled with the medical costs necessitated by his illness depleted the Randalls' financial resources.

These health and financial concerns prompted the Randalls to terminate their pending legal action. On May 3, 1985, they again filed a notice of voluntary dismissal. The Randalls were informed by counsel that the second voluntary dismissal might have a preclusive effect under the "two-dismissal rule," which is a subsection of Federal Rule 41. That subsection provides that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claims." Fed. R. Civ. P. 41(a)(1).

After the second voluntary dismissal, appellees filed, on July 9, 1985, a petition for arbitration with the National Association of Securities Dealers. In August, Merrill Lynch filed suit in the Eastern District of Columbia to enjoin the arbitration, citing the two-dismissal rule. The district court granted defendant's motion for summary judgment on that basis. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Randall*, 110 F.R.D. 499 (E.D. Cal. 1985). In its opinion, the court stated that "the proper remedy is for the Randalls to move to vacate the second dismissal before the District Court for the District of Columbia rather than a third attempt to litigate the claim." *Id.* at 500.

In March, 1986, appellees filed just such a motion to vacate, and the District Court for the District of Columbia granted the motion on May 14, 1986. *See Randall* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civ. No. 85-0942 (D.D.C. May 14, 1986). The court relied on Rule 60(b)(6), which permits a court to relieve a party from a final judgment for reasons of justice. The court found that at the time of the second dismissal, "Mr. Randall suffered a disabling illness that would permit his participation in this litigation only at the risk of even greater disability" and that "Mr. Randall's illness caused a serious depletion of [appellees'] assets, leaving them unable to maintain litigation in this district." *Id.* at 5. The court also held that the Randalls' decision to terminate the case was not "free, calculated, or strategic," but rather was "precipitated by events beyond their control." The court further found that vacating the second dismissal would not prejudice Merrill Lynch. *Id.* at 6. These findings, coupled with a strong policy favoring resolution of cases on the merits, persuaded the court to grant the Randalls' motion. This appeal followed.

II. DISCUSSION

A. Authority Under Rule 60(b)(6) to Vacate Voluntary Dismissals

Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure provides a simple, self-executing mechanism whereby a case may be dismissed in certain circumstances without motion, argument, or judicial order. When the plaintiff files a notice of dismissal before service by the adverse party of an answer or of a motion for summary judgment, the dismissal takes effect automatically: the trial judge has no role to play at all. Appellant contends that the dismissal is not only automatic but also irreversible. A trial judge, appellant argues, has no discretion to vacate a Rule 41(a)(1)(i) voluntary dismissal. According to appellant, a judge may not vacate such a dismissal even pursuant to Rule 60(b)(6), which authorizes a court on motion to relieve a party from a "final judgment, order or proceeding for . . . any . . . reason justifying relief from the operation of judgment."

Appellant primarily relies on *Thorp* v. *Scarne*, 599 F.2d 1169 (2d Cir. 1979), and *D.C. Electronics, Inc.* v. *Narton Corp.*, 511 F.2d 294 (6th Cir. 1975), to support this proposition. We find these authorities inapposite. They held that a trial judge has no discretion to *prevent* a voluntary dismissal in the first instance; they did not speak to whether a court has discretion to vacate a voluntary dismissal at a subsequent time on the original plaintiff's motion. Appellant also cites *Santiago* v. *Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985). But this case also is wide of the point. In *Santiago*, the court held only that once a plaintiff has voluntarily dismissed his case the trial court has no jurisdiction to grant a defendant's motion for attorney's fees. *Santiago* has no bearing on a court's authority to entertain a 60(b) motion to set aside a dismissal under Rule 41(a)(1)(i). In short, appellant cites no case law, and this court has found none, to support its position.

No such case exists because the language of the Federal Rules of Civil Procedure clearly supports the opposite result. As noted previously, Rule 60(b) allows a court to relieve a party from a "final judgment" for any reason justifying relief. Because the voluntary dismissal in this case operated as an adjudication on the merits, it was a "final judgment" under Rule 60(b). And nothing in the language of Rule 41(a)(1)(i) exempts voluntary dismissals from the scope of judicial authority under Rule 60(b). We therefore conclude that the district court had power to vacate this voluntary dismissal under Rule 60(b) if the requisite justification existed.

B. Justification for Application of Rule 60(b)(6)

A trial court enjoys a large measure of discretion in deciding whether to grant or deny a 60(b) motion, *see* 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.19 (2d ed. 1985); 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2857 (1973). A reviewing court may reverse a district court's grant of relief under Rule 60(b)(6) only for an abuse of discretion. *See Southern Pacific Telecommunications Co.*

v. *American Telephone & Telegraph Co.*, 740 F.2d 1011, 1017 (D.C. Cir. 1984).

Rule 60(b) "was intended to preserve the 'delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts.' " *Good Luck Nursing Home* v. *Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). Two Supreme Court cases delineate the broad parameters within which district courts are to exercise their discretion in achieving this balance. In *Klapprott* v. *United States*, 335 U.S. 601 (1949), the Court approved the use of Rule 60(b)(6) to vacate a default judgment entered against the petitioner at a time when the petitioner was unrepresented by counsel, facing health and financial hardships, and serving a prison term. The Court stressed that courts should apply Rule 60(b)(6) whenever such action is appropriate to accomplish justice. *Id.* at 614-15. In *Ackermann* v. *United States*, 340 U.S. 193 (1950), however, the Court distinguished *Klapprott* as an exception to the general principle of the finality of judgments. The Court stressed that Rule 60(b)(6) should not be used to relieve a party of the consequences of voluntary litigation choices or improvident strategic decisions. The Court also found that mere financial hardship was insufficient justification for vacating a final judgment under Rule 60(b). It therefore held that the district court had not abused its discretion in denying petitioner's 60(b)(6) motion.

Applying these parameters, we find that the district court's decision to vacate the second voluntary dismissal was not an abuse of discretion. *Ackermann* prohibits a court from utilizing Rule 60(b)(6) to relieve a party from a voluntary dismissal based only on financial hardship. In this case, however, the lower court found that Mr. Randall suffered a disabling illness that would have permitted his participation in the litigation only at the risk of even greater disability. We find that the district court did not abuse its discretion in determining that this combination of health *and* financial considerations was sufficient to permit relief under Rule 60(b)(6).

Appellant urges, however, that the district court committed an error of law in characterizing the second voluntary dismissal as not "free, calculated, or strategic." This argument relies on the language of Rule 41. Appellant argues that a dismissal cannot be "voluntary" under Rule 41 without at the same time entailing the kind of strategic choice which the Supreme Court held in *Ackermann* is beyond repair by Rule 60(b). Appellant asserts that the only circumstances that would act to make a Rule 41 dismissal "involuntary" would be instances of fraud or misapprehension. We do not believe that Rule 41 can be so construed. The term "voluntary" in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court. In other words, it does not mean that other circumstances might not have compelled the dismissal or that the party desired it. We therefore find that a dismissal may be "voluntary" under Rule 41(1) without being "free, calculated, and deliberate" in the sense *Ackermann* indicates would preclude relief under Rule 60(b)(6). The district court's conclusion that this was such a case was not an abuse of discretion in light of the combination of circumstances confronting the Randalls when they decided to file for a second voluntary dismissal.

Finally, we note that the district court's order does not unduly prejudice Merrill Lynch. Merrill Lynch contends that it has been prejudiced by the passage of time between the second dismissal and the district court's order. But that period — just over a year — was not so lengthy as to have prejudiced Merrill Lynch's ability to defend itself in court. Cf. *Washington* v. *Penwell*, 700 F.2d 570, 572-73 (9th Cir. 1983) (four-year delay not unreasonable in light of extraordinary circumstances); *Twentieth Century-Fox Film Corp.* v. *Dunnahoo*, 633 F.2d 1338, 1341 (9th Cir. 1981) (six-year delay unreasonable in case of liquidated-damages decree and no extraordinary circumstances). Merrill Lynch also claims that it has suffered prejudice because it must now incur additional costs to contest the Randalls' claims. Additional legal costs, however, are the inevitable result whenever a judgment is vacated. *See Werner* v. *Carbo*, 731 F.2d 204, 207

(4th Cir. 1984). Yet Rule 60(b) certainly contemplates that some judgments will be vacated. In the circumstances of this case, particularly given the fact that the previous, abortive litigation can hardly have imposed significant costs on Merrill Lynch, we find that the prospect of future litigation costs does not rise to the level of unfair prejudice.

III. CONCLUSION

Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which trial courts are to use sparingly, but their discretion to employ it is not to be lightly overturned on review. We hold that Rule 60(b)(6) can be used to vacate voluntary dismissals resulting in final judgments, and that the district court did not abuse its discretion in relying on appellees' combination of hardships to vacate their second voluntary dismissal. The judgment of the district court is affirmed.

It is so ordered.

WILLIAMS, Circuit Judge, concurring and dissenting: I agree with the majority that Rule 60(b)(6) of the Federal Rules of Civil Procedure vests courts with discretion to set aside a voluntary dismissal. However, I believe that the district court abused this discretion in vacating the Randalls' second dismissal.

The Randalls first attempted to prosecute their claim in the Northern District of California. After that court ordered the case transferred to Washington, D.C. and while a motion to dismiss was pending there, the Randalls voluntarily dismissed the action under Rule 41(a)(1). Meanwhile they started again in California, this time in the Eastern District. That court likewise ordered the case transferred to Washington, D.C.; the Randalls again voluntarily dismissed the action. Less than two months later they started yet a third litigation, presenting the claim to the National Association of Securities Dealers, Inc., for arbitration in San Francisco.

This pattern of sustained maneuvering to have their claim heard in California belies the notion that intense financial

and medical pressures *compelled* the Randalls to enter the dismissals. They were quite capable of pursuing the claim, but wished to exhaust every possible gambit to assure that the litigation would occur in California. They were represented by counsel, who advised them that voluntarily dismissing the action a second time might operate as dismissal on the merits. *See* Fed. R. Civ. P. 41(a)(1). Nonetheless they proceeded with the second dismissal, without pursuing any of the precautionary steps open to them, such as seeking a stay pending arbitration or requesting the court to dismiss without prejudice under Rule 41(a)(2). On this record it is impossible to conclude that the second dismissal was other than a "free," "calculated," and "deliberate" choice that does not justify relief under Rule 60(b)(6). *See e.g., Ackermann* v. *United States*, 340 U.S. 193, 198 (1950).

Nor can I agree that the Randalls' "previous, abortive litigation can hardly have imposed significant costs on Merrill Lynch." *Ante* at 8. Twice now the Randalls have forced Merrill Lynch to gear up for litigation. Each time Merrill Lynch filed and briefed motions to transfer and motions to dismiss. Each time Merrill Lynch prevailed in getting the action transferred over the strenuous objections of the Randalls, only to have the Randalls abort the action before the motion to dismiss could be considered. Under Rule 41(d) the court could have forced them to compensate Merrill Lynch for the costs of the *first* action before permitting the second to go forward. I see no basis for concluding that these costs are not significant (and the majority has not suggested one), or for believing that the costs Merrill Lynch will have to incur preparing for trial yet a third time will not also be substantial. *Compare Werner* v. *Carbo*, 731 F.2d 204, 206 (4th Cir. 1984) (judgment against professional corporation vacated where corporation's liability coextensive with that of principal and retrial of suit against principal required in any event).

"There must be an end to litigation someday." *Ackermann* v. *United States*, 340 U.S. at 198. If this means anything, it means that the interest in repose counts as a powerful equity against re-opening a judgment under Rule 60(b)(6). Often it

is the only equity. Indeed, that was the case in *Ackermann* itself, where the Court insisted that relief should be granted under Rule 60(b)(6) only under "extraordinary circumstances." *Id.* at 200, 202. The judgment against the Randalls did not result from extraordinary circumstances, but from a litigation strategy gone sour.

I would reverse.

United States Court Of Appeals
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 86-5372
LAURENCE E. RANDALL, et al.
v.
MERRILL LYNCH, et al.

SEPTEMBER TERM, 1986
CA NO. 85-00942

BEFORE: MIKVA, STARR AND WILLIAMS, CIRCUIT JUDGES

O R D E R

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, *Clerk*

BY:
ROBERT A. BONNER
Deputy Clerk

[File-stamped Sept. 03 1987]

United States Court Of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 86-5372

LAURENCE E. RANDALL, et al.
v.
MERRILL LYNCH, et al.

SEPTEMBER TERM, 1986
CA NO. 85-00942

BEFORE: WALD, CHIEF JUDGE; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS AND D. H. GINSBURG, CIRCUIT JUDGES

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, *Clerk*

BY:
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Bork did not participate in this order.

[File-stamped Sept. 03 1987]

United States District Court
FOR THE
DISTRICT OF COLUMBIA

LAURENCE E. RANDALL, et al.,
Plaintiffs,

v.

MERRILL LYNCH,
PIERCE, FENNER &
SMITH, INC.,
Defendant.

CIVIL ACTION
NO. 85-0942

COUNSEL: For Plaintiffs: Paul H. Melbostad, San Francisco, California, *pro hac vice*, and Douglas Huron, Washington, D.C.

For Defendant: Laurie J. Miller, San Francisco, California, *pro hac vice*, and Stuart M. Goldberg, Washington, D.C.

MEMORANDUM

Plaintiffs voluntarily dismissed this case in May, 1985. Currently before the Court is plaintiffs' motion to vacate that dismissal and to stay this case pending arbitration.

I. BACKGROUND

The filing of the instant motion is the latest event in a protracted dispute arising from the plaintiffs' maintenance of securities accounts with the defendant. This dispute began in December, 1983, when plaintiffs filed their first complaint against defendant in the U.S. District Court for the Northern District of California. As amended, the complaint alleged violation of various federal securities laws and regulations, as well as breach of securities exchange rules, racketeering, and claims for breach of contract, breach of fiduciary duty, and conversion, among others. Because plaintiffs opened and maintained their accounts in defendant's Washington, D.C. office, defendant moved to transfer

the case under 28 U.S.C. § 1404(a). Defendant also moved to dismiss the case.

Defendant's motion to transfer was granted on April 23, 1984, without a ruling on defendant's motion to dismiss. After plaintiffs' motion to reconsider the transfer ruling was denied, plaintiffs immediately voluntarily dismissed their case on August 13, 1984, before any proceedings in this court.

On July 31, 1984, plaintiffs filed a revised complaint in the U.S. District Court for the Eastern District of California, where they reside. This second complaint was based upon the same set of facts which gave rise to the first complaint. As before, defendant moved to transfer the case to this district and to dismiss the case for failure to state a claim. In March, 1985, the court granted the motion to transfer and held the motion to dismiss in abeyance.

After transfer, the case was assigned to this Court. On May 3, 1985, before any proceedings in this Court, plaintiffs again filed a notice of voluntary dismissal. At that time, plaintiffs were advised by their counsel that the second voluntary dismissal might have preclusive effect under the "two-dismissal" rule. That rule provides that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claims." Fed. R. Civ. P. 41(a)(1).

On July 9, 1985, plaintiffs filed a petition for arbitration with the National Association of Securities Dealers. In August, defendant filed suit in the Eastern District of California to enjoin the arbitration by reason of the two-dismissal rule. The district court granted defendant's motion for summary judgment on that basis. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Randall*, Civ. No. S-85-1184 SJG (E.D. Cal. Dec. 31, 1985). In its opinion, the court stated that "the proper remedy is for the Randalls to move to vacate the second dismissal before the District Court for the District of Columbia rather than a third attempt to

litigate the claim." *Id.*, mem. at 3. Plaintiffs then filed the instant motion to vacate.

II. DISCUSSION

Since plaintiffs' second voluntary dismissal operates as an adjudication on the merits, plaintiffs may vacate that dismissal only pursuant to Rule 60 of the Federal Rules of Civil Procedure, which permits relief from judgments in certain circumstances. This motion is brought pursuant to Rule 60(b)(6),[1] which provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time. . . .

Rule 60(b)(6) may afford relief from a final judgment when Rules 60(b)(1) through 60(b)(5) are inapplicable and "equitable action is appropriate to accomplish justice." *Peacock* v. *Board of School Commissioners*, 721 F.2d 210, 214 (7th Cir. 1983). The rule thus "was intended to preserve the 'delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of *all* the facts.' " *Good Luck Nursing Home* v. *Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (quoting *Bankers Mortgage Co.* v. *United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) (emphasis in original)). Accordingly, the granting or denial of a Rule 60(b)(6) motion is entrusted to the sound discretion of the district court. *See Southern Pacific Telecommunications Co.* v. *American Telephone & Telegraph Co.*, 740 F.2d 1011 (D.C. Cir. 1984).

Here plaintiffs cite several grounds for granting their motion. First, they note that in August, 1984, Laurence Randall

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[1] Plaintiffs concede that their motion does not fall within Rule 60(b)(1), which concerns mistake or excusable neglect, Rule 60(b)(2), which relates to newly discovered evidence, Rule 60(b)(3), which addresses fraud, misrepresentation, or misconduct, rule 60(b)(4), which is directed toward void judgments, or Rule 60(b)(5), which concerns satisfied judgments.

suffered an "attack of acute, stress-related anxiety disorder and was certified as fully disabled by the State of California." Randall's doctors directed him not to participate in any "cross-country court litigation" because "the inherent stress could cause him much more serious physiological consequences such as a heart attack or stroke." Mr. Randall's incapacity depleted the Randalls' financial resources, leading them to conclude that "it would not be prudent for them to expend any of the remaining resources to hire a lawyer in Washington, D.C."[2]

Plaintiffs also contend that defendant would not be prejudiced if their motion to vacate were granted. Finally, plaintiffs assert that denial of their motion would deprive them of the opportunity to have the merits of their claims considered. Thus, plaintiffs conclude, their motion should be granted to avoid the harsh result that would occur if Rule 41(a)(1) were strictly applied.[3]

The "primary requirement" of Rule 60(b)(6) is a showing of "justification for relief from the judgment." *Harjo* v. *Andrus*, 581 F.2d 949, 953 (D.C. Cir. 1978). Here plaintiffs have demonstrated compelling reasons for relief. Through affidavits, plaintiffs have shown that Mr. Randall suffered a disabling illness that would permit his participation in this litigation only at the risk of even greater disability. Defendant does not challenge either the fact of Mr. Randall's illness or its severity. Moreover, plaintiffs have established that Mr. Randall's illness caused a serious depletion of their assets, leaving them unable to maintain litigation in this district. Disabling illness and financial hardship previously

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[2] Mr. Randall apparently recovered from his anxiety attack and was allowed by his doctors to return to work in November, 1985. Plaintiffs therefore now have sufficient funds to permit their retention of Washington, D.C. counsel for purposes of bringing the instant motion.

[3] Plaintiffs do not, and cannot, directly attack the propriety of the California district court's application of the two-dismissal rule. Plaintiffs did not appeal that court's ruling, so it constitutes "the law of the case." *See United States* v. *Smelting Refining and Mining Co.*, 339 U.S. 186 (1950); *National Souvenir Center* v. *Historic Figures, Inc.*, 728 F.2d 503, 510 n.3 (D.C. Cir.), *cert. denied*, 105 S. Ct. 103 (1984).

have been accepted as grounds for granting Rule 60(b) relief. *See Klapprott* v. *United States*, 335 U.S. 601, 614 (1949).

Defendant points out that plaintiffs knew of the effect of the two-dismissal rule and of non-preclusive alternatives to voluntary dismissal. To be sure, courts have stated that Rule 60(b)(6) may not be used to relieve a party from the consequences of improvident strategic decisions or "free, calculated, deliberate choices." *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950); *see Good Luck Nursing Home*, 636 F.2d at 577. Under the circumstances confronting plaintiffs, however, it cannot be contended that their decision to terminate this case was free, calculated, or strategic. Rather, their decision was precipitated by events beyond their control. Furthermore, any of the suggested alternatives to voluntary dismissal would have required some additional litigation that plaintiffs simply could not afford.

An additional matter to be considered is whether the opposing party will be unfairly prejudiced by Rule 60(b) relief. *See Jackson* v. *Washington Monthly Co.*, 569 F.2d 119, 122 (D.C. Cir. 1978). Defendant claims that it would suffer prejudice because it would be required to expend additional time and money to contest plaintiffs' claims. The mere cost of litigation, however, does not constitute unfair prejudice for Rule 60(b) purposes. *See Werner* v. *Carbo*, 731 F.2d 204, 207 (4th Cir. 1984).

The Court also notes the well-established principle favoring resolution of cases on their merits. *See, e.g., Jackson* v. *Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980). This "preference for disposition of cases on their substantive merits" requires that a judgment "disposing of a case without consideration of the merits," such as through operation of the two-dismissal rule, be treated somewhat differently for Rule 60(b)(6) purposes. 7 J. Moore, *Moore's Federal Practice* ¶ 60.27[2], at 60-280 (1985 ed.). The court of appeals has recognized this concern:

> Although relief under Rule 60(b) is discretionary with the trial court, we think that the liberal spirit of the rule,

> together with the basic policy favoring resolution of litigation on the merits requires us to review closely the exercise of that discretion in cases . where the denial of the motion has precluded consideration of the merits of the controversy.

Spann v. *Commissioners*, 443 F.2d 715, 716 n.1 (D.C. Cir. 1970) (per curiam). As such, the lack of any decision on the merits of plaintiffs' claims, when viewed in light of the circumstances leading to the second voluntary dismissal, provides further support for Rule 60(b) relief.

The Court does not believe that granting plaintiffs' motion will subvert the purpose of the two-dismissal rule. That rule is intended to "prevent an unreasonable use of dismissal" that might otherwise allow a plaintiff to harass a defendant through repeated filing of lawsuits. 5 J. Moore, *Moore's Federal Practice* ¶ 41.04, at 42 (1985 ed.); *see Engelhardt* v. *Bell & Howell Co.*, 299 F.2d 480, 483 (8th Cir. 1962). There is no evidence of harassment in this case. To the contrary, the record indicates that, upon transfer of each of the two cases to this district, the plaintiffs promptly notified defendant of their intention not to pursue the litigation in this forum. This notification was an effort to prevent defendant from incurring any unnecessary costs in connection with the litigation. Plaintiffs' conduct thus is a far cry from the type of harassment that Rule 41(a)(1) was designed to address.

The Court's review of the above-noted circumstances leads it to conclude that plaintiffs have demonstrated the "exceptional circumstances" necessary to justify Rule 60(b)(6) relief. *See Good Luck Nursing Home*, 636 F.2d at 577 n.1. The remaining question is whether plaintiffs made their motion within the "reasonable time" required by the rule. What constitutes a reasonable time depends upon the facts of the case. *See Smith* v. *Secretary of HHS*, 776 F.2d 1330 (6th Cir. 1985). In this case, plaintiffs made their motion within one year after their second voluntary dismissal and less than three months after the district judge in

California concluded that the two-dismissal rule barred arbitration of their claims. Under these circumstances, the Court concludes that plaintiffs' motion is timely.

The Court therefore rules that plaintiffs' motion must be granted and the second voluntary dismissal vacated. Because the parties have not fully briefed the question of whether this action should be stayed pending arbitration, the Court grants each party leave to file memoranda on that issue by May 30, 1986.

Date: May 14, 1986

/s/ OLIVER GASCH
Judge

[File-stamped May 15, 1986]

IN THE
United States District Court
FOR THE
EASTERN DISTRICT OF CALIFORNIA

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *Plaintiffs*,
v.
LAURENCE E. RANDALL, and NADINE D. RANDALL, *Defendants*.

CIV. NO. S-85-1114-EJG

ORDER GRANTING SUMMARY JUDGMENT

The motion of plaintiff Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") for summary judgment pursuant to Fed. R. Civ. P. 56 came on regularly for hearing on November 15, 1985. The court has considered the papers in support of, and in opposition to, Merrill Lynch's motion, the arguments of counsel, and the other papers on file in this action.

The material facts are not in dispute. Defendants Laurence E. Randall and Nadine D. Randall first filed a complaint against Merrill Lynch in the Northern District of California on December 6, 1983. This complaint was based on the same claim the Randalls now seek to arbitrate before the National Association of Securities Dealers, Inc. After transfer of their first lawsuit to Washington D.C., on August 8, 1984 the Randalls voluntarily dismissed that action pursuant to Fed. R. Civ. P. 41(a)(1).

On July 30, 1984 the Randalls filed a second lawsuit, once again alleging the same claim. This lawsuit was also transferred to Washington D.C., and on May 3, 1985 the Randalls again voluntarily and unilaterally filed a notice of dismissal pursuant to Rule 41(a)(1).

The Randalls do not dispute that they twice voluntarily dismissed their complaints against Merrill Lynch. Nor do they dispute that their arbitration claim is based on the same set of facts as the dismissed complaints. Merrill Lynch now seeks to enjoin the Randalls from proceeding to further litigate the claims underlying their two dismissed lawsuits because of the res judicata effect of the second dismissal pursuant to Rule 41(a)(1).

The Randalls contend that summary judgment should be denied because there are material issues in dispute, including (1) whether their voluntary dismissals were made in bad faith or with the intent to harass Merrill Lynch, and (2) whether the application of Rule 41(a)(1) in this case would effectuate the Rule's purpose, which the Randalls contend is to prevent unreasonable abuse and harassment.

The court holds that Rule 41(a)(1) requires no such findings. The disputed issues of fact identified by the Randalls are not material. The application of Rule 41(a)(1) in this case is purely a question of law.

The Randalls have only cited one case in which Rule 41(a)(1) was not literally applied; *i.e. Poloron Products, Inc.* v. *Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012 (2d Cir. 1976). In that case, the court appears to have bent over backwards to avoid the harsh result of dismissal with prejudice in a case where the first dismissal was by stipulation. Neither of the Randalls' voluntary dismissals were by stipulation. The court has found no case mitigating the effect of Rule 41(a)(1) in a case where there have been two successive unilateral voluntary dismissals. Consequently,

IT IS HEREBY ORDERED that Merrill Lynch's motion for summary judgment is GRANTED. The court has determined that the Randalls' two voluntary dismissals of lawsuits against Merrill Lynch operated as an adjudication upon the merits of their claims, pursuant to Fed. R. Civ. P. 41(a)(1). Accordingly, subsequent efforts to litigate the

merits of the Randalls' claims are barred by the "two dismissals rule". Although the Randalls contend that the application of that rule is unduly harsh in this instance, the proper remedy is for the Randalls to move to vacate the second dismissal before the District Court for the District of Columbia rather than a third attempt to litigate the claim. *Engelhardt* v. *Bell & Howell Co.*, 299 F.2d 480 (8th Cir. 1962); and Wright & Miller, § 2368 p.190.

Therefore, defendants are hereby enjoined from pursuing further litigation (including their pending claim in arbitration) against plaintiff based on the same set of facts underlying their two voluntarily dismissed lawsuits until such time as the District court for the District of Columbia vacates the second dismissal.

IT IS SO ORDERED.

Dated: December 31, 1985.

/s/

Edward J. Garcia, *Judge*

United States District Court

[File-stamped Jan. 3, 1986]

IN THE

United States District Court

FOR THE

EASTERN DISTRICT OF CALIFORNIA

LAURENCE E. RANDALL,
and
NADINE D. RANDALL,
Plaintiffs,

v.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
A Delaware
Corporation,
Defendants.

NO. 84-0992-EJG
ORDER GRANTING MOTION TO TRANSFER AND DENYING SANCTIONS

The motions of defendant Merrill Lynch, Pierce, Fenner and Smith Inc. to transfer this action pursuant to 28 U.S.C. 1404, to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., and for sanctions pursuant to Rule 11, Fed. R. Civ. P., came on regularly for hearing on February 22, 1985. Merrill Lynch was represented by Steven A. Brick and Orrick, Herrington & Sutcliffe. Plaintiffs Randall were represented by Paul H. Melbostad and the Law Offices of Thomas E. Horn. The Court, having considered all of the papers on file herein and having heard oral argument hereby orders as follows:

1. The motion to transfer this action to the United States District Court for the District of Columbia is hereby GRANTED. The Court finds that the rationale of *General Electric Co.* v. *Westinghouse Electric Corp.*, 297 F. Supp. 84 (D. Mass. 1969) is controlling here. The decision of the United States District Court for the Northern District of California in transferring this action to the District of Columbia, despite plaintiffs' argument that it should be transferred to this Court, is controlling here absent a demonstration by plaintiffs of a compelling change in circumstances. *Hayman Register Co.* v. *Sarokin*, 669 F.2d 162, 169-70 (3rd Cir. 1982). Plaintiffs have not met their burden of demonstrating by credible evidence that a material change of

circumstances has occurred. Moreover, even if it were appropriate for this Court to review the decision of the Northern District of California on its merits, it is apparent that the Court applied the appropriate standard for reviewing a discretionary transfer motion and reached the correct result.

2. Because of its ruling transferring this action, the Court will leave to the transferee court the question of the sufficiency of the complaint.

3. Merrill Lynch's motion for sanctions under Rule 11 is hereby DENIED.

Dated: March 11, 1985

/s/
Edward J. Garcia
United States District Court

[File-stamped Mar. 12, 1985]

IN THE

United States District Court

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

LAURENCE E. RANDALL,
and
NADINE D. RANDALL,
Plaintiffs,
v.
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., A Delaware Corporation,
Defendants.

NO. C 83-5804-TEH

ORDER OF TRANSFER

Defendant has moved this Court pursuant to 28 U.S.C. § 1404(a) for an order transferring this action to the United States District Court for the District of Columbia. The motion came on regularly for hearing on April 23, 1984. The Court has considered the arguments of counsel and all papers on file in this action.

In ruling on a motion to transfer under 1404(a), a court must consider each of the issues listed in that section: (1) convenience of the parties, (2) convenience of witnesses, and (3) the interests of justice. *Kasey* v. *Molybdenum Corp. of America*, 408 F.2d 16, 20 (9th cir. 1969). The plaintiff's choice of forum is also a factor to be balanced. *Northern Acceptance Trust 1065* v. *Gray*, 423 F.2d 653, 654 (9th Cir.), *cert. denied*, 398 U.S. 939 (1970). That choice, however, warrants less consideration where the plaintiff does not reside in the chosen forum and where the forum lacks significant contact with the underlying controversy. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949, 954-55 (9th Cir. 1968).

In this action, plaintiffs reside in Chico, California, which lies outside the Northern District of California and approximately 175 miles from this Court. Plaintiffs have failed to

demonstrate that this action has any connection to this forum, other than the presence of their counsel here. On the other hand, defendant has demonstrated that most of the events that gave rise to the complaint occurred in Washington, DC, that most of defendant's witnesses and records are located in or near Washington, DC, and that the District of Columbia is clearly a district where this action "might have been brought." 28 U.S.C. 1404(a). Although plaintiffs have complained of hardship if the action is transferred, defendant has introduced evidence indicating that plaintiffs are individuals of considerable wealth. Although the losses alleged in the complaint would have reduced the extent of their wealth, it does not appear that a transfer will work such a hardship on plaintiffs as to prevent them from adequately litigating their action. On the other hand, the convenience of witnesses and the interests of justice favor a transfer to the District of Columbia, which has obvious connection to this action, unlike the present forum.

Accordingly, having balanced the factors relevant to this motion and found that good cause exists for a transfer,

IT IS HEREBY ORDERED that defendant's motion to transfer is GRANTED and this action is transferred to the United States District Court for the District of Columbia.

IT IS SO ORDERED.

Dated: April 23, 1984

/s/
Thelton E. Henderson
United States District Judge

[File-stamped Apr. 23, 1984]